



U.S. Department of Justice

Immigration and Naturalization Service

VU

OFFICE OF ADMINISTRATIVE APPEALS  
425 Eye Street N.W.  
ULLB, 3rd Floor  
Washington, D.C. 20536



Public Copy

File: LIN-98-143-51126

Office: Nebraska Service Center

Date: JAN 11 2000

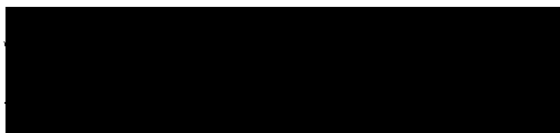
IN RE: Petitioner:  
Beneficiary:



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prevent clearly unwarranted  
invasion of personal privacy

Petition: Petition for a Nonimmigrant Worker Pursuant to Section 101(a)(15)(L) of the Immigration and Nationality Act, 8 U.S.C. 1101(a)(15)(L)

IN BEHALF OF PETITIONER:



INSTRUCTIONS:

This is the decision in your case. All documents have been returned to the office which originally decided your case. Any further inquiry must be made to that office.

If you believe the law was inappropriately applied or the analysis used in reaching the decision was inconsistent with the information provided or with precedent decisions, you may file a motion to reconsider. Such a motion must state the reasons for reconsideration and be supported by any pertinent precedent decisions. Any motion to reconsider must be filed within 30 days of the decision that the motion seeks to reconsider, as required under 8 C.F.R. 103.5(a)(1)(i).

If you have new or additional information which you wish to have considered, you may file a motion to reopen. Such a motion must state the new facts to be proved at the reopened proceeding and be supported by affidavits or other documentary evidence. Any motion to reopen must be filed within 30 days of the decision that the motion seeks to reopen, except that failure to file before this period expires may be excused in the discretion of the Service where it is demonstrated that the delay was reasonable and beyond the control of the applicant or petitioner. Id.

Any motion must be filed with the office which originally decided your case along with a fee of \$110 as required under 8 C.F.R. 103.7.

FOR THE ASSOCIATE COMMISSIONER,  
EXAMINATIONS

Terrance M. O'Reilly, Director  
Administrative Appeals Office

**DISCUSSION:** The nonimmigrant visa petition was denied by the Director, Nebraska Service Center, and is now before the Associate Commissioner for Examinations on appeal. The appeal will be dismissed.

The petitioner, a construction company, seeks to extend its authorization to employ the beneficiary temporarily in the United States as its president/general manager. The director determined that the petitioner had not established that the beneficiary had been or would be employed in a primarily managerial or executive capacity.

On appeal, counsel submits a brief in rebuttal to the director's findings.

To establish L-1 eligibility under section 101(a)(15)(L) of the Immigration and Nationality Act (the Act), 8 U.S.C. 1101(a)(15)(L), the petitioner must demonstrate that the beneficiary, within three years preceding the beneficiary's application for admission into the United States, has been employed abroad in a qualifying managerial or executive capacity, or in a capacity involving specialized knowledge, for one continuous year by a qualifying organization.

8 C.F.R. 214.2(l)(14)(ii) states that a visa petition under section 101(a)(15)(L) which involved the opening of a new office may be extended by filing a new Form I-129, accompanied by the following:

(A) Evidence that the United States and foreign entities are still qualifying organizations as defined in paragraph (l)(1)(ii)(G) of this section;

(B) Evidence that the United States entity has been doing business as defined in paragraph (l)(1)(ii)(H) of this section for the previous year;

(C) A statement of the duties performed by the beneficiary for the previous year and the duties the beneficiary will perform under the extended petition;

(D) A statement describing the staffing of the new operation, including the number of employees and types of positions held accompanied by evidence of wages paid to employees when the beneficiary will be employed in a managerial or executive capacity; and

(E) Evidence of the financial status of the United States operation.

The United States petitioner was established in 1995 and states that it is a branch office of [REDACTED] located in

[REDACTED] The petitioner seeks to extend the employment of the beneficiary for a two-year period at an annual salary of \$37,440.

At issue in this proceeding is whether the beneficiary has been and will be employed in a primarily managerial or executive capacity.

Section 101(a)(44)(A) of the Act, 8 U.S.C. 1101(a)(44)(A), provides:

"Managerial capacity" means an assignment within an organization in which the employee primarily-

- i. manages the organization, or a department, subdivision, function, or component of the organization;

- ii. supervises and controls the work of other supervisory, professional, or managerial employees, or manages an essential function within the organization, or a department or subdivision of the organization;

- iii. if another employee or other employees are directly supervised, has the authority to hire and fire or recommend those as well as other personnel actions (such as promotion and leave authorization), or if no other employee is directly supervised, functions at a senior level within the organizational hierarchy or with respect to the function managed; and

- iv. exercises discretion over the day-to-day operations of the activity or function for which the employee has authority. A first-line supervisor is not considered to be acting in a managerial capacity merely by virtue of the supervisor's supervisory duties unless the employees supervised are professional.

Section 101(a)(44)(B) of the Act, 8 U.S.C. 1101(a)(44)(B), provides:

"Executive capacity" means an assignment within an organization in which the employee primarily-

- i. directs the management of the organization or a major component or function of the organization;

- ii. establishes the goals and policies of the organization, component, or function;
- iii. exercises wide latitude in discretionary decision-making; and
- iv. receives only general supervision or direction from higher level executives, the board of directors, or stockholders of the organization.

In her decision, the director noted that the beneficiary's duties such as managing a work team, overseeing corrections, estimating costs, negotiating contracts, scheduling employees, and handling the advertising, accounting, and invoicing, are not primarily managerial or executive in nature. The director further noted that the petitioner had not established that the U.S. entity had a permanent office in the U.S.

On appeal, counsel states in part that:

As President and General Manager of [REDACTED] the Beneficiary has the highest level of decision-making for the US company. He is responsible for all decisions regarding pricing, hiring and firing of employees and/or sub-contractors, promotions and purchasing of all equipment. The Beneficiary manages the US entity without any outside assistance from [REDACTED] (Canada). He meets with building inspectors, architects, safety consultants, builders/developers and engineers, window distributors, lumber salespersons, and engineered product distributors to negotiate and implement projects. On behalf of [REDACTED] the Beneficiary bids on jobs worth up to \$250,000. He also hires all of the subcontractors for the projects. The Beneficiary has been solely responsible for increasing the profits of the company. In 1996, [REDACTED] gross revenue was \$124,523. In 1997, the gross revenue was \$177,930.

The management is aware that the Beneficiary runs Akubilt Construction from his home, which is equipped with a telephone and fax machine so he can conduct business. Therefore, the Beneficiary does not move to the various construction sites; he has an established residence in Utica, Michigan. It is not unusual in today's business world for a business to be conducted out of one's home. As indicated, the Beneficiary has the technology available to be able to conduct the business out of his residence, and has been running a successful business for the past three years.

Counsel cites unpublished AAU decisions, which have no precedential effect in this proceeding. See 8 C.F.R. 103.3(c). Counsel states that the beneficiary oversees independent contractors and argues that the utilization of these services should be construed as the use of contracting services akin to that discussed in the unpublished decisions. However, the U.S. entity's corporate tax returns reflect a minimal use of subcontractors; it paid \$5,835 for subcontracting services in 1997, \$0 for subcontracting services in 1996, and \$206 for subcontracting services in 1995. It has also not been shown that the level of the petitioner's business activities warrants comparison with the business in the decisions cited by counsel.

The record indicates that the U.S. entity was established on March 8, 1995, and the beneficiary entered the U.S. as an L1-A on June 16, 1995. The record further indicates that the present petition was filed on April 21, 1998, and that the U.S. entity has the following five employees: the beneficiary as the president and general manager; a foreman responsible for overseeing general construction, assisting in general construction and working as a framer; a forklift operator responsible for general construction, equipment maintenance and clean up; and two workers responsible for general construction and clean up. The duties described for the beneficiary's subordinate employees along with the petitioner's minimal utilization of subcontractors indicate that the beneficiary primarily performs the duties of a first-line supervisor over nonprofessional employees. As such, the record does not persuasively establish that the U.S. entity contains the organizational complexity to support a managerial or executive position.

The record does not reflect that the beneficiary functions at a senior level within an organizational hierarchy other than in position title. There is no comprehensive description of the beneficiary's duties that persuasively demonstrates that the beneficiary has been and will be performing in a primarily managerial or executive capacity. There is no evidence to establish that the petitioner employs a subordinate staff of professional, managerial, or supervisory personnel who relieve the beneficiary from performing nonqualifying duties. The record contains no comprehensive description of the beneficiary's duties that demonstrates that the beneficiary has been and will be managing or directing the management of a department, subdivision, function, or component of the petitioning organization. For this reason, the petition may not be approved.

In visa petition proceedings, the burden of proof remains entirely with the petitioner. Section 291 of the Act, 8 U.S.C. 1361. Here, that burden has not been met.

**ORDER:** The appeal is dismissed.